No. 266.
Br. of Baxter for Def'ts.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

No. 266.

Wilberforce Sully, Trustee; Wilberforce Sully in his own right, Alfred B. Carhart, Mrs. Mary P. Myton and The Travelers' Insurance Company, Plaintiffs in Error,

versus

The American National Bank et al.

Reply Brief, on Behalf of The Defendants in Error, The American National Bank, Shields Bros. and Scioto Star Fire Brick Works.

E. J. BAXTER,
Sol. for Defendants in Error.

DEADERICK & EPPS,
E. J. BAXTER, of Counsel.

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versus

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IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR. THE AMERICAN NATIONAL BANK ET AL.

A statement of the case is fairly made by appellants in their briefs, and further mention will not be made except by reference to the record in argument.

Plaintiffs in error, seek a re-examination, by this court, of the decree rendered by the Supreme Court of Tennessee upon the ground that the Act of the General Assembly of Tennessee passed March 19, 1877, being chapter 31 of said Acts, is

unconstitutional, as being in violation of Section 2 of Article 4 of the Constitution of the United States, which is as follows:

"The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States."

And of Section 1 of the 14th Amendment to the Constitution of the United States which is as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court of Tennessee held, that the Act of 1877, Chapter 31 of the General Assembly was not in controvention or violation of either of the Articles of the United States Constitution, as above quoted.

The defendants in error, The American National Bank, Shields Bros. and Scioto, Star Fire Brick Works, filed a bill in behalf of themselves and all other creditors of the Carnegie Land Company, under and in pursuance of the Statute of 1877, which Statute had been sustained by the highest Court of the State prior to the filing of this bill and prior to the execution of any of the contracts sought to be enforced.

The various courts of the State sustained their contention in this instance, and the assets of the corporation were decreed to be distributed in accordance with the provisions of that Act.

Record page 47.

The bone of contention in this case is the distribution of assets amounting to $66,123.31.

Record page 145.

The amount decreed to creditors resident in Tennessee was $29,377.36 as having accrued prior to Nov. 23, 1891, the date of registration of the Travellers' Insurance Company's mortgage.

$13,794.35 accrued after Nov. 23, 1891 and prior to Feb. 10,

1893, the date of registration of the mortgage to Wilberforce Sully, trustee.

$1,860.97 accrued after Feb. 10, 1893.

Record page 144.

$35,406.19 was due The Travelers' Insurance Company, a corporation of the State of Connecticut, and was secured by a mortgage registered Nov. 23, 1891.

$105,124.99 was due Wilberforce Sulley, trustee, and A. B. Carhart residents of New York, and was secured by mortgage registered Feb. 10, 1893.

Record page 144.

The total indebtedness of the Carnegie Land Company was $271,321.55.

Record page 145.

The decision of the highest court of a State, that a statute is not in conflict with the Constitution of the State is conclusive upon all the courts of the United States and will not be reviewed by them. But, if the ground of invalidity urged against the statute is, that it contravenes the Federal Constitution, or an Act of Congress, the Federal Courts will not be bound by the decisions of the State Courts.

Atlantic & G. R. Co. v. Georgia, 98 U. S. 359.
Louisiana v. Pillsbury 105 U. S. 278-294,26 L. ed. 1090-5.

It is urged with equal emphasis, that the validity of an Act of Congress may be passed upon by the State Courts, until it has been settled by the Supreme Court of the United States.

Lent v. Tilson 140 U. S. 316.

The statute of 1877, ch. 31 having been declared by the Supreme Court of the State to be a valid enactment, since the date of its passage, and creditors resident within the State have contracted with the Carnegie Land Company under said statute and with reference to the provisions thereof.

Non-resident creditors contracted with this corporation, with notice of this statute, and under its terms and provis-

ions. The laws enacted by the General Assembly of a State are for the public good and all are presumed to know them.

Will this Court say, although there has been a well established precedent as to the validity of the statute, that resident creditors must yield their rights? Would not such reasoning create a more serious interference with the property rights of the Tennessee creditors than would be remedied by giving new property right to non-resident creditors, who had not contracted for them under the statute?

Where state decisions establish a rule of property rights, this Court, if it is possible to do so, will adopt and follow the settled rule of construction affixed by the State court of last resort, to the statute law of the state. And this rule obtains whether the decision of the highest court of the State declaring the validity of the statute was delivered before or after the property rights have attached.

Burgess v. Seligman 107 U. S. 20-34: 27 L. ed. 359-365.
Miller v. Ammon, 145 U. S. 423: 36 L. ed. 761.
Warburton v. White (No. 101) decided by this Court Feb. 26, 1900.

The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under and in pursuance of the Act are concerned. Their validity and obligation can not be impaired by any subsequent decision altering their construction.

This doctrine applies as well to the construction of the organic law, as to the construction of a statute.

Louisiana v. Pillsbury 105 U. S. 278-294: 26 L. ed. 1096.
Douglass v. Pike Co. 101 U. S. 686.

A mortgage given upon property situated in Tennessee, by an insolvent corporation doing business in said State by legislative permission, securing non-resident creditors, which, when foreclosed as was intended at the time, by the party executing the mortgage, would result in defeating bona fide creditors, will be controlled by the laws of the State of Tennessee in determining the rights of the parties thereunder.

Etheridge v. Sperry, 139 U. S. 276-277: 35 L. ed. 176.
Purifier Co. v. McGroarty 136 U. S. 241; 34 L. ed. 348.

The Travelers' Insurance Company came into Court and submitted its case upon the contract it had made with The Carnegie Land Company as it stood under the decision of the State Court.

It did not raise any question in the lower court against the validity of the statute under which it had contracted, on the Constitutional question here urged, and having failed to make that defense against the statute in the lower court, it will not be permitted to raise the question for the first time in an appelate court.

The question must be presented to the court below and be decided adversely to plaintiff in error before this court will have jurisdiction.

Church v. Kelsey 121 U. S. 282: 30 L. ed. 960.

In order to give this Court jurisdiction of a writ of error to review a judgment of the highest Court of a State, on the ground that it decided against a title, right, privilege or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege or immunity must have have been specially set up or claimed at the proper time and in the proper way

If it was not claimed in the trial Court, and therefore, by the law and practice of the State, as declared by its highest Court, could not be considered by that Court; or if it was not claimed in any form before judgment in the highest Court of the State, it can not be asserted in this Court."

Morrison v. Watson, 154 U. S. 115: 38 L. ed. 929.

It is the well settled law in the State of Tennessee that unless questions are specifically raised by the pleadings in the lower court the appellate or Supreme Court will not permit it to be raised for the first time in that court.

The failure of a party to raise the objection below is fatal and he can not claim protection under the objections made by another party to the record.

Campbell v. Railroad, 98 Tenn. 126.
Denton v. Wood, 86 Tenn. 37.
Rule 29 of Supreme Court, 85 Tenn. 737.

Does the statute of 1877, as complained of, take away fundamental right and exclude a judicial inquiry of liability? Certainly not.

It has made no contract for the parties, and seeks to make none.

The statute simply prescribes what may be done, and if a non-resident seeks to come into a State and contract with a resident of that State, he is presumed to do so with full knowledge of the requirements of the statute. Risk, therefore, can only come from his failure to observe due care, such care, as might be supposed without promptings from the law.

The Carnegie Land Company was a non-resident corporation, incorporated under the laws of Virginia, but doing business in Tennessee, by Legislative authority. The authority of the corporation was, therefore, statutory, and it could not, execute a preferential trust or mortgage in violation of its statutory authority. This is elemental.

Purifier Co. v. McGroarty 136 U. S. 237: 34 L. ed. 346.

It is the law of Tennessee, of long standing, having been so declared by the Supreme Court of the State, and under such statutory conditions, all contracts are made, and property held.

Such discretion is reasonable, not oppressive or discriminatory, so as to render it subject to constitutional objection.

Whatever a State may do with corporations of its creation it may do with foreign corporations admitted into the State.

Hooper v. California 155 U. S. 648: 39 L. ed. 297.
Insurance Co. v. Doggs decided by this Court January 16, 1899.

A legislative enactment is the law of the State and must be controlling upon corporations and citizens of the State with respect to their rights to acquire property and to enter into contracts.

Such legislation is reasonable and no abridgment of the Federal Constitution.

The parties seeking relief in this court upon the theory that the Act of the Tennessee Legislature (1877 ch. 31) is uncon-

stitutional in that it deprives them of property without due process of law, are non-residents of Tennessee.

In so far as the question involves the rights of Plaintiff in Error, The Travelers' Insurance Company, a Connecticut corporation, it needs no further discussion here since the deliverance of this Court in BLAKE v. MCCLUNG 172 U. S. 239.

In that case the Court says: "A corporation of another State can not invoke the Constitutional guaranty of equal privileges and immunities of citizens in case of discrimination against it in favor of the residents of a State in respect to participation in the assets of an insolvent corporation."

Blake v. McClung 172 U. S. 239: 43 L. ed. 432.

If creditors, non-resident of Tennessee, insist upon the unconstitutionality of the Act of 1877 ch. 31, and claim an equal distribution in the assets of a foreign corporation being wound up under a general creditor's proceeding in the State Court of Tennessee, the spirit of the law governing their fundamental right would require them to show equal rights and privileges with the Tennessee creditors.

Has this been done?

(1) They are citizens of the State of New York contracting under the laws of New York and with a view of having the debt paid at the office of the company in New York.

(2) The Carnegie Land Company was a foreign corporation and the State had a right to make reasonable restrictions and limitations.

(3) Wilberforce Sully, trustee, was the treasurer of the Carnegie Land Company and knew of its financial condition at the time of the issuance and sale of the bonds to A. B. Carhart and of the execution of the mortgage to secure same. And the Bonds and Mortgage referring to each other, would give the holder and owner of them full notice of all existing equities.

(4) The mortgage to Sully was made expressly subject to the terms of a prior mortgage and in recognition thereof and to that extent must abide the fate of that mortgage.

The policy of the law is to secure resident creditors of a foreign insolvent corporation as against foreign creditors as to the assets within the State.

May v. First National Bank 122, Ill. 551.
Woodward v. Brooks, 128, Ill. 222.

The above principle may well be doubted as the correct principle of equity in a commercial country, if the Constitutional theory of the government is such that it fosters the free and untrammeled commercial relationship between the different States of the Union.

If that theory be correct, State lines should place no limitations or restrictions upon the full and complete enjoyment of that guaranty.

Any other view would place a premium on provincialism and retard interstate and international comity.

But, every State owes protection to its own citizens and when non-residents deal with them it is a just and legitimate exercise of authority to hold and appropriate any property owned by non-residents to satisfy the claims of its citizens.

Brogg v. Gaynor. 85 Wis. 468.
Penoyer v. Neff. 95 U. S. 714.

If, therefore, the equitable maxim of equality is equity, is sound doctrine in fundamental principle, before the plaintiffs in error in this particular case can claim that constitutional guaranty, they must show equality of fundamental right, and this is not done under the facts of this record.

A contract made in one State to be performed where made, is governed by the laws of that State, notwithstanding the obligation may be secured by a real estate mortgage in another State.

Pingree on Mortgages Sec. 795.
Cope v. Alden 53 Barb. 352.
Mills v. Wilson 88 Pa. 118.
Chase v. Daw 47 N. H. 405.
Story on Conflict of Laws, Secs. 243-4, 272, 287.
Cope v. Wheeler 41 N. Y. 306.
Pritchard v. Norton 106 U. S. 124.
Cogbland v. R'y Co. 142 U. S. 112.; L. ed. 954.

The very debt which Wilberforce Sully, trustee, is seeking to collect by this proceeding is a New York contract debt secured by a mortgage in Tennessee and the very terms of the mortgage make the payment of his debt subject to the payment of The Travellers' Insurance Company's mortgage.

Having contracted that way, and pleaded that way in reliance upon his mortgage, if he has a status in court it must be based upon the terms of his mortgage contract and his debt would only be good and his lien take effect from the date of registration of his mortgage, to-wit: Feb. 10, 1893.

The reasonableness of the rule can be seen at a glance; a corporation organized in another State, locates its plant in Tennessee contracts and is contracted with by the residents of Tennessee while the Treasurer of the corporation is yonder in the metropolis of the country issuing bonds against the corporation for more than the value of the entire plant, and a mortgage is executed to the treasurer as trustee to secure the bonded indebtedness. The mortgage is put to record and all the resident creditors of the State are defeated.

Reverse the rule: The Legislature enacted the law of 1877, which is notice to the world of the rights and privileges of resident Tennessee creditors, and the man or corporation in a foreign State must inquire as to the nature of his security which is only the natural thing for a cautious business man to do.

The court will enforce the contract made by the parties and in doing so keep within the purview of the 14th Amendment to the Constitution of the United States.

A suit in equity to establish a trust in the legal holder of the title to property is "due process of law," within the meaning of the 14th Amendment.

Church v. Kelsey 121 U. S. 282:30 L. ed. 960.

Where a corporation or citizen of one State contracts with a corporation or citizen of another State, and secures his note or bond by a mortgage upon corporate property, the debt and the mortgage as incident thereto will be enforced unless it is against public policy or in violation of the constitution.

Courts will not make, alter or modify the terms of a contract.

The holder of the debt and the mortgage have acquired property rights, and property within the meaning of the constitution, includes contracts necessary for its enjoyment, protection, use, and disposition.

Protection of property includes within it, necessarily, protection of its mortgagee in all the incidents of his contract security.

Coal Co. v. People, 22 L. R. A. 340; 147 Ill. 66.
Frorer v. People, 16 L. R. A. 492; 141 Ill. 171.
People v. Gilson, 109 N. Y. 389.

It is an inherent and inalienable right to make contracts.

Leep v. St. Louis, 23 L. R. A. 204.

Under the Constitution and under the construction given to such contracts by the courts these rights are property rights, and under the 14th Amendment will be preserved and protected, therefore, the property rights of the mortgagees, plaintiffs in error, were fixed by the registration of their mortgages and they were justly entitled to and can claim, under the Act 1877 ch. 31, payment of their respective mortgages, in the order of their registration—payments being made out of the proceeds of the property covered by the mortgages and after all debts and contracts prior to such registration have been removed.

The right to make such contracts is one the of attributes of property, and to deprive a person of that right is depriving him of property within the meaning of the Constitution.

Re. Jacobs, 98 N. Y. 98.
American Reports, Vol. 50. page 636.

This is a fundamental right, brought to this country by its Pilgrim Fathers and wrested from time to time, in the progress of history, from the sovereigns of the English nation.

It can not be denied that the parties claiming under The Travelers' Insurance Company's mortgage are entitled to a lien from the date of registration of its mortgage.

The lien of the Sully-Carhart mortgage would date from its registration.

The parties were in a position at that time to frame their contracts and to bind themselves, subject only to the general laws forbidding those contracts which are immoral and illegal.

State v. Loomis, 21 L. R. A. 789.
Bertholf v. O'Reilley, 74 N. Y. 515.
52 American Rep. 34.
Cooley Const. Lim. 6th ed. 431.
San Mateo Co. v. Southern P. M. Co. 13 Fed. Rep. 145.
Slaughter House case, 111 U. S. 746: 28 L. ed. 585.

These are private rights, and "due process of law" is that course of legal proceedings according to the rules and forms of law which have been established for the protection of private rights.

Davidson v. New Orleans, 96 U. S. 103: 24 L. ed. 619.
Westervelt v. Gregg, 12 N. Y. 209.
Munn v. Ill., 94 U. S.: 113: 24 L. ed. 77.

The General Assembly of any State has the power to prescribe the terms upon which a foreign corporation may enter within its territory for the purpose of conducting its business, but that power is limited by Sec. 2 Art. 4 of the Constitution of the United States.

The State can not pass a law to defeat a vested right, or impair such a right, under due process of law.

Plaintiffs in Error in this case had no rights to be defeated or impaired until their contracts were completed in the registration of their mortgages and by registering a mortgage they could not defeat a prior vested right under the Constitution and laws of the State.

In the free exercise of the privileges and immunities granted to citizens of the several States by the Constitution, these mortgagees perfected their rights and it would be no infringement upon such a right under the supreme law of the land to compel them to stand upon their rights as thus contracted without any interference with the statutory law of the State as to rights accruing thereunder prior to the mortgagee's contract.

Such an interpretation of the law is both reasonable and just and can not be declared hostile to the fundamental rights guaranteed to the citizens of the several States.

There has been no interference with or impairment of a fundamental right granted or secured by the 14th Amendment to the Constitution of the United States.

Slaughter House Cases 83 U. S. : 21 L. ed. 394.
Presser v. Ill. 116 U. S. 252: 29 L. ed. 615.

Magna Charta, Article fifty six declares: "No free man shall be taken, or imprisoned, or disseised, or outlawed, or banished, or anyways destroyed, nor will the King pass upon him or commit him to prison, unless by the legal judgment of his peers, or, by the law of the land."

This great and wise statement has always been regarded as the great safeguard of liberty and has been incorporated, though not in the same language, in every American Constitution.

"Due process of law" or "the law of the land" being the more familiar expression to us, but these expressions are exactly equivalent in import.

Davidson v. New Orleans, 96 U. S. 97.

While that ancient, significant and historical interpretation of these words is of value, it is not exclusive; as centuries are numbered even the foundations of liberty may be modified.

For courts to determine otherwise would be to deny every quality of the law but its age and render progress and improvement, not only unnecessary, but impossible. The very fountains of justice are not exhausted, and new and varied forms of experiences may shape this honored declaration into new but not less useful forms,

Hurtado v. California 110 U. S. 516: 28 L. ed. 232.

As to the language taken from Magna Charta and incorporated into the Constitution, after all has been said, it was only intended to secure and protect individuals in the enjoyment

of the established principles of private rights and distributive justice.

Leeper v. Texas, 139 U. S. 462; 35 L. ed. 225.

In judicial proceedings, "due process of law" or "the law of the land" requires that the party shall be properly brought into court, and when there, shall have the right to set up any lawful defense to any proceeding against him.

There is no judicial proceeding in this case depriving any of the parties of property rights under the legislative enactments of the State, but a judicial declaration of these rights as they existed by contract.

Record, page 87.

The question of "due process of law" as contained in the 14th Amendment to the Constitution of the United States does not mean by judicial proceeding, and is foreign to the issue here.

McMillan v. Anderson 95 U. S. 37; 24 L. ed. 335.
Kelley v. Pittsburg 104 U. S. 78; 26 L. ed. 658.

"Due process of law" in a State is regulated by the law of that State.

Walker v. Sauvinet 92 U. S. 90; 23 L. ed. 678.

The law of Tennessee having been declared by the Supreme Court of the State, we insist that it is in harmony with the "law of the land."

The Supreme Court of Tennessee in passing upon the question say: "A statute is the law of the land" which embraces all persons who are already or who may thereafter come into similar situations, conditions, and circumstances"

Henley v. State, 98 Tenn. 698, and authorities cited.

This is not class legislation, there is nothing vicious nor forbidden in it. It applies equally to corporations and individuals that are or may put themselves into like situation or circumstances, and is therefore a natural and reasonable

classification which meets the requirements of such legislation.

Railroad v. Harris, 99 Tenn. 705, citing authorities.
Cooley Const. Law, 249.
Hayes v. Missouri 120 U. S. 68; 30 L. ed. 578.
Maryland v. Broadbelt, 45 L. R. A. 486, citing numerous authorities.

It was recently held by this Court, "that a statute permitting an attachment against a non-resident debtor without a bond, while requiring a bond for an attachment against a resident debtor, does not constitute a denial to the non-resident of the equal protection of the law, because it was within the power of the legislature to divide debtors into two classes—non-resident and resident—and when so classified, to prescribe different methods of proceeding against them."

Central Loan and T. Co. v. Com. Co., 173 U. S. 84; 43 L. ed. 623.

Again it is insisted that plaintiffs in error failed to avail themselves of their constitutional right to invoke the aid of this Court by failing to raise this Federal question in the Chancery Court where the cause was first heard. And Wilberforce Sylly, trustee, A. B. Carhart, Mary P. Myton and E. C. Manning failed even to raise the question of the unconstitutionality of the Act in the Supreme Court and it is raised here for the first time by them.

Under the rules of this Court they have not put themselves within its jurisdiction. And under the rules of the State Court, all questions must be fairly raised and presented, and relied on by all the parties in the lower Court in order to claim the benefits of a reversal in the Appellate Court. This rule is true, even upon exceptions to a Master's Report under a valid decree, unless the exception is specifically made and relied on it is beyond the control and revisory power of the Appellate Court.

"This is so, though the defendants affected be infants and the report erroneous upon the proof."

Allen v. Shank, 90 Tenn. 377.
Henley v. State, 98 Tenn. 689.
Pollard v. Wellford, 99 Tenn. 114.
Gribble v. Wilson, 101 Tenn 616.
Enc. Plead and Prac., Vol. 8, page 287 et seq.

This court has held in numerous instances that if a party in the statement of his own claim, does not disclose a Federal question, he does not create jurisdiction by anticipating what some other party to the record claims or may claim. And the mere suggestion by a party in his pleading that a State statute is void because in contravention to the Constitution of the United States, is insufficient to give jurisdiction.

Florida Cent. & P. R. Co. v. Bell, decided February 26, 1900, and reported in advance sheets under date of March 15, 1900, at page 402.

The attention of the Court is called to the fact that Complainants in Error have wholly failed to place themselves within the rule giving the Court jurisdiction upon the Federal question urged by them.

(1). They failed to raise the question in the trial court.

(2). It can not be raised for the first time on appeal. Shelby County v. Bickford, 102 Tenn. 395.

(3), When raised for the first time in the Court of Chancery Appeals was not specified, but was too general, vague and indefinite to bring it within the rule.

The language of the exceptor being: "7. By writ of error, complainant excepts to that part of the decree which holds the Acts of 1877 and 1891 constitutional, and thus giving Tennessee creditors' debts previously contracted, priority." The Judges cases, 102 Tenn., 511, citing with approval, State v. Henley, supra.

(4) The exception as above quoted was only made by complainants Carhart and Sully, Trustee, and in the Appellate Court, Carhart, alone filed exceptions based upon that exception.

Rule 29 of the Supreme Court of Tennessee 85 Tenn. page 757, is as follows:

"In all civil causes on the dockets of this Court in the several grand divisions of the State * * * and in all causes hereafter appealed or on writ of error to this Court, it shall be the duty of the appellants or plaintiffs in error, their attorneys or solicitors, to file on or before the first day of the term to which appeals have been or may hereafter be taken, or are

triable, specific assignments of error to the rulings of the courts below, as well as to errors of fact, pointing out definitely the error or errors complained of, and citing in the most concise manner the specific testimony relied upon, designating page of record" &c.

"If this rule is not complied with the judgment or decree will be affirmed, unless strong and sufficient reasons are shown for the failure."

"Errors not embraced in assignment will be treated as waived."

Rule 29, supra.

It is proper to say that one of the complainants in the original bill, Scioto Star Fire Brick Works, is a corporation organganized under the laws of Ohio, and this original complainant does not stand in the same attitude as the other complainants.

It was not contended in the court below, nor is it contended here, that its rights are equal with the rights of the other complainants.

The decree of the court postponed the payment of its debt in the order hereinbefore mentioned.

The claim of Shields Bros., another one of the original complainants, was for a very small sum, to-wit, about $150.00, and this party has informed us by letter that he does not desire to prosecute his contention in this court, as the amount of his claim would not justify such action on his part.

This refusal, however, on the part of Shields Bros is not intended to be construed as, in any way, conceding the contention of plaintiffs in error, and such contention is not now conceded.

The law of Tennessee having been declared by the Supreme Court of the State, we insist that it is in harmony with "the law of land." And submitting the question of jurisdiction in this Court as well as the equality of fundamental rights under "the law of the land," we ask for an affirmance of the decree.

E. J. BAXTER, Sol for Defendants in Error.

DEADERICK & EPPS,

E. J BAXTER, of Counsel.